UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

METALCRAFT OF MAYVILLE, INC.

and

Case 18–CA–178322

DISTRICT LODGE NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS OF AMERICA, AFL-CIO

Renée M. Medved, Esq., for the General Counsel.

Thomas P. Krukowski, Esq. and *Christopher C. Rundell II, Esq. (Mallery & Zimmerman, S.C.),* of Milwaukee, Wisconsin, for the Respondent.

Jill M. Hartley, Esq. (The Previant Law Firm, S.C.), of Milwaukee, Wisconsin, for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. In March 2015, the State of Wisconsin enacted a right-to-work law prohibiting union-security agreements, including requiring an individual, as a condition of employment, to become or remain a union member or to pay dues to a union. The State law also prohibited employers from deducting union dues from employees' paychecks, unless an employee signed an authorization terminable upon at least 30 days' written notice. Both of these prohibitions applied "to the extent permitted under federal law." On June 5, 2016, the collective-bargaining agreement between the Respondent, Metalcraft of Mayville, Inc., and the Union, International Association of Machinists, renewed for 1 year. As a result of the renewal, the contract became subject to the Wisconsin right-to-work law for the first time. Two days prior to that occurring, the Respondent notified the Union that it would no longer enforce either the union-security or the dues-checkoff provisions in their agreement. The Respondent then ceased checking off and remitting dues to the Union. The General Counsel's complaint in this case principally alleges that the Respondent's unilateral cessation of dues checkoff violated Section 8(a)(5) of the National Labor Relations Act (the Act). The Respondent answers, in part, that the Wisconsin right-to-work law rendered its action lawful. As explained fully herein, I conclude that the Act gave the State of Wisconsin the authority to enact prohibitions on union security, but preempts the state's attempt to regulate dues checkoff. I further find that the Respondent's cessation of dues checkoff was unlawful.

STATEMENT OF THE CASE

On June 14, 2016, District Lodge No. 10, International Association of Machinists and Aerospace Workers of America (IAM), AFL–CIO (the Union or Charging Party) filed a charge against Metalcraft of Mayville, Inc. (the Respondent or the Company).[1] On August 11, the Union filed an amended charge and, on September 21, it filed a second amended charge. On September 29, the General Counsel issued a complaint against the Respondent. The complaint alleges the Respondent violated Section 8(a)(5) of the Act since about June 4, by unilaterally ceasing to check off dues for bargaining unit employees and to remit those dues to the Union. The complaint also alleges this action constituted an unlawful modification of the parties' collective-bargaining agreement within the meaning of Section 8(d) of the Act. The complaint further alleges that, through letters dated June 6, 7, and 27, the Respondent undermined the Union by communicating with employees regarding the appropriateness of their current union dues-checkoff authorization forms, thereby violating Section 8(a)(5). Finally, the complaint claims that the Respondent bypassed the Union and dealt directly with employees by soliciting revised union dues-checkoff authorization forms in the letters, also in violation of Section 8(a)(5). The Respondent filed a timely answer to the complaint on October 12, in which it denied the allegations and asserted numerous affirmative defenses.[2] I conducted a trial on the complaint on December 5, in Milwaukee, Wisconsin.

On the entire record, including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in metal fabrication and the manufacture of lawn maintenance equipment from a facility in Mayville, Wisconsin. During the calendar year ending December 31, 2015, the Respondent, in conducting its business operations described above, sold and shipped, from its Mayville facility, goods valued in excess of $50,000 directly to points outside the State of Wisconsin. The Respondent admits, and I find, that, at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction. The Respondent also admits, and I find, that IAM District 10 and Rock River Lodge No. 2053 both are labor organizations within the meaning of Section 2(5) of the Act.

[1] All dates hereinafter are in 2016, unless otherwise noted. Although IAM District Lodge 10 filed the charge in this case, IAM Rock River Lodge No. 2053 is the signatory for the Union on its collective-bargaining agreement with the Respondent. References to "the Union" are to both entities collectively.

[2] The transcript inadvertently omits pages 14 and 15 from the Respondent's answer. (GC Exh. 1(i).) The transcript is corrected to include those pages.

II. ALLEGED UNFAIR LABOR PRACTICES

At the Mayville facility, the Respondent and the Union have a longstanding collective-bargaining relationship going back decades. The Union represents assemblers, maintenance employees, and welders. Currently, the unit consists of approximately 350 employees. Ronald Lock has been the plant manager for 22 years. The Union's business representatives at times material to this case were Scott Parr and David Grapentine.

A. Union Security, Dues Checkoff, and Checkoff Authorization Language

The last negotiated collective-bargaining agreement between the Respondent and the Union initially ran from June 2, 2013, to June 4, 2016.[3] Article 25 of the contract addressed union shop and dues checkoff:

> 25.1 The Company agrees as a condition of employment that all eligible employees shall become members of the Union (as that term is defined by applicable law) on or before 90 calendar days following the beginning of their employment or the effective date of this Agreement, whichever is later. All employees who become members of the Union shall remain members of the Union during the term of this Agreement.
>
> 25.2 The Company, within three (3) days after receipt of written notice from the Union, will discharge any employee subject hereto who is not in good standing in the Union as required by the preceding paragraph. The Union shall indemnify and save the Company harmless against all forms of liability that shall arise out of or by reason of the application of this Article.
>
> 25.3 Upon receipt of a signed authorization (conforming to applicable law) voluntarily submitted and executed in writing by an employee covered by this Agreement, the Company shall deduct from the first payroll check in each month appropriate monthly dues and any initiation fees for each employee who has signed an authorization. Union shall notify the Company the amount (sic) of monthly dues and initiation fees.

The contract also contains a separability clause directing that portions of the agreement in conflict with Federal or State law would be inoperative, without affecting any other parts of the contract.

During the term of the contract and going back to 2001, the Union utilized a "Membership Application and/or Check-Off Authorization" form pursuant to article 25. That form stated in relevant part:

[3] Jt. Exh. 2. The parties' collective-bargaining agreement for this period does not contain the correct dates in art. 24 addressing duration. The correct term of the agreement is listed on the cover page.

> Membership Application. Check here: ☐ To the Officers and Members of Lodge No. _____ (the "Lodge" or "Union "), I hereby tender my application for membership in the International Association of Machinists and Aerospace Workers (IAM). I understand that while I may be required to tender monthly fees to the Union, I am not required to apply for membership or be a member as a condition of employment and that this application for membership is voluntary…
>
> Check-Off Authorization. Check here: ☐ I authorize my Employer to deduct from my wages and forward to the Union: (1) monthly membership dues or an equivalent service fee; and (2) any required initiation or reinstatement fee as set forth in the collective bargaining agreement between the Employer and the Union and the by-laws of the Lodge. This authorization shall be irrevocable for one (1) year or until the termination of the collective bargaining agreement between my Employer and the Union, whichever occurs sooner. I agree that this authorization shall be automatically renewed for successive one (1) year periods or until the termination of the collective bargaining agreement, whichever is the lesser, unless I revoke it by giving written notice to my Employer and Union not more than twenty (20) and not less than five (5) days prior to the expiration of the appropriate yearly period or contract term. I expressly agree that this authorization is independent of, and not a quid pro quo, for union membership, but recognizes the value of the services provided to me by the Union. It shall continue in full force and effect even if I resign my Union membership, except if properly revoked in the manner prescribed above.
>
> Important Notice. I have examined and acknowledge receipt of the attached "Notice to Employees Subject to Union Security Clauses"…

The referenced notice is contained on the back of the employee copy of the checkoff authorization form. The notice states in relevant part:

> Employees working under collective bargaining agreements containing union security clauses are required, as a condition of employment, to pay amounts equal to the union's monthly dues and applicable initiation and reinstatement fees…

The remainder of the notice provides information on how employees could object to their funding of union expenditures that are not germane to the collective-bargaining process.[4]

Prior to June 4, the Respondent provided the Union's membership application and/or dues-checkoff authorization form to new hires for signature during employee orientation.[5] For employees who signed the forms, the Respondent regularly deducted dues payments from employees' paychecks no later than the 15th of the month.

B. The Wisconsin Right-to-Work Law

On March 9, 2015, with the parties' contract mid-term, the State of Wisconsin enacted a right-to-work law. It implemented the law on March 11, 2015. With respect to union security, the law states:

> No person may require, as a condition of obtaining or continuing employment, an individual to do any of the following:

[4] The parties entered into evidence all of the dues-checkoff authorization forms maintained by the Respondent and signed by employees prior to June 4, 2016. (Jt. Exh. 1.) The exhibit contains nearly 300 such forms going as far back as 1978. Almost all of the forms from 2001 forward use the language cited above. However, at least a handful of these forms from post-2001 contain only dues-checkoff language and nothing concerning union security. The forms pre-2001 similarly contain only language regarding dues checkoff. The checkoff language in the post-2001 forms differs in two respects from the pre-2001 forms. First, the last two sentences containing the "quid pro quo" language was new ("I expressly agree that this authorization is independent of, and not a quid pro quo, for union membership, but recognizes the value of the services provided to me by the Union. It shall continue in full force and effect even if I resign my Union membership, except if properly revoked in the manner prescribed above."). Second, the time period during which employees could request revocation of the authorization was different. The pre-2001 forms contained a 30-day window period. Most of the post-2001 forms contained a 15-day window period between 5 and 20 days prior to the yearly deadline. However, the post-2001 forms with only checkoff language contained a 14-day window period instead.

[5] The Respondent contends that, before June 4, it required employees to agree to both union membership and dues checkoff on the form in order to remain employed. However, the record evidence does not establish this. Plant Manager Lock testified on direct that the Company's procedure was to provide employees with the collective-bargaining agreement, as well as the membership application and dues-checkoff authorization form, at orientation. (Tr. 132–133.) He stated the Respondent had employees "sign it and give us back a copy of it." He then confirmed, in response to a leading question, that he had told an unspecified number of employees that "they would be terminated without signing it…" I find this generalized testimony insufficient to demonstrate that the Respondent required employees to agree to dues checkoff, as opposed to simply becoming union members, after they were hired. Lock did not say the Respondent required employees to check the box agreeing to dues checkoff, when the Respondent provided the form. Lock also conceded on cross examination that employees did not have to pay their union dues solely by checkoff. (Tr. 156–157.) The Respondent's own exhibit demonstrates that, although most of the Respondent's employees chose the convenience of checkoff, not all did. (R. Exh. 16.) I also do not credit Union Business Representative Parr's inconsistent testimony concerning whether dues checkoff was mandatory or voluntary. (Tr. 82–84, 104–105.) Parr stated on the one hand that dues checkoff was mandatory, but then testified that employees could pay their dues in manners other than through checkoff. Thus, he appeared to confuse union security with dues checkoff. For all these reasons, I conclude that dues checkoff was voluntary for the Respondent's employees prior to June 5.

> Become or remain a member of a labor organization.
> Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization.
>
> This subsection applies to the extent permitted under federal law. If a provision of a contract violates this subsection, that provision is void.

WIS. STAT. 111.04(3)(a)(2), (3)(a)(3), and (3)(b) (2015). Anyone who violates this provision is guilty of a class A misdemeanor and subject to a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both. WIS. STAT. 947.20 and 939.51 (2015). The Wisconsin right-to-work law also makes it an unfair labor practice for an employer:

> To deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable by the employee giving to the employer at least 30 days' written notice of the termination. This paragraph applies to the extent permitted under federal law.

WIS. STAT. 111.06(1)(i) (2015). The law first applied "to a collective bargaining agreement containing provisions inconsistent with this act upon the renewal, modification, or extension of the agreement occurring on or after the effective date of this subsection."[6]

C. The Respondent's Cessation of Dues Checkoff in June 2016

As previously noted, the parties' collective-bargaining agreement was set to expire on June 4. The contract required any party that wished to modify, amend, or terminate the agreement to provide written notice of that desire at least 60 days prior to the expiration date.[7] In the event no party provided notice, the agreement automatically renewed for a period of 1 year.

It is undisputed that the Union did not provide the Respondent with timely notice of a desire to reopen the contract by April 5. As a result, the parties' contract renewed for 1 year beginning June 5.

From April 12 to June 2, the Respondent and the Union communicated multiple times regarding the Wisconsin right-to-work law. On April 12, Plant Manager Lock sent Union Business Representative Grapentine a letter stating that the renewal of the contract "puts into effect" the Wisconsin right-to-work law.[8] On April 29, Lock and Grapentine had a phone conversation, during which Lock said that the two needed to talk about the impact of the right-to-work law. Grapentine responded that it was not necessary. Lock's email to Grapentine dated May 3 stated his contention that several provisions of the contract would be unlawful once the

[6] R. Exh. 13, Sec. 13.
[7] Jt. Exh. 2, Art. 24.1.
[8] R. Exh. 2.

law applied.[9] He further said that they should discuss the impact of the law on the agreement and directed Grapentine to contact the Respondent's attorney in that regard. In a follow-up email on May 4, Lock stated again to Grapentine that "the legality of the Union security clause should be dealt with…"[10] In mid-May, the Union replaced Grapentine with Parr as the business representative to deal with the Respondent. On June 2, Parr sent a letter to Lock via email.[11] Parr stated:

> As the contract was not opened up by the Union, it has been renewed for a period of one year. The Wisconsin "right-to-work" law states that when a contract is renewed, it becomes subject to the law. The separability clause on page three of the current agreement will cover this issue. As dues check-off is governed by federal law, that issue need not be addressed. Your employees have the right to opt out of the Union during the 15 day window period listed on their dues check-off authorization.

On June 3, Lock responded via letter to Parr's contentions.[12] Lock stated:

> Under the state law, Article XXV, the Union Shop and Check-Off of Union Dues, is unlawful effective June 4. The dues check-off provision under Article XXV and the authorization form also becomes illegal because both are inseparable the basis (sic) for the authorization and the language of the authorization itself is premised on the unlawful union security provision. Both compel the employees to pay Union dues as a condition of employment. The language of the written authorization form requires that employees who may resign from the union must pay "agency fees," which is also not currently permitted under Wisconsin law. The language of the Collective Bargaining Agreement, specifically Article XXV, Section 25.3, provides "Upon receipt of a signed authorization (conforming to applicable law) …" Your authorization form does not comply with the state law because it specifically compels the payment of Union dues and therefore it does not conform to Wisconsin Law. Your form in part provides, "Employees working under collective-bargaining agreements containing union security clauses are required, as a condition of employment, to pay amounts equal to the Union's monthly dues…" Under the law, specifically Section 111.04(3)a, "No person may be required, as a condition of obtaining or continuing employment, an individual to do any of the following…: 3. Pay any dues, fees, assessment, or other charges or expenses of any kind or amount…"

[9] R. Exh. 3.
[10] Jt. Exh. 5.
[11] Jt. Exh. 6.
[12] Jt. Exh. 7.

> Therefore, the company believes that Article XXV of the contract and the authorization form do not comply with Wisconsin Law and neither will be enforced after June 4, 2016.

The Respondent did not check off dues and remit payment to the Union beginning in June 2016. Other than the written communication described above, the parties did not meet or bargain prior to the Company taking this action. Moreover, no employee had attempted to revoke a dues-checkoff authorization prior to the cessation.

D. The Respondent's Subsequent Communications with Unit Employees

On June 6, 7, and 27, Lock provided letters to employees with answers to purported questions that employees asked about the contract renewal and the new right-to-work law.[13] He did not consult with the Union before doing so, nor did he provide the Union with copies of the letters.

In the first letter on June 6, Lock communicated the Respondent's position on the impact of the new law.[14] This included:

> Simply stated, after June 4, the law prohibits requiring employees to pay Union dues. To do so would be a Class A Misdemeanor or a crime under Wisconsin law. If you want to pay Union dues, it is now your decision and it's entirely voluntary…
>
> Currently you pay $59.30 per month or $711.60 per year in Union dues. All together our employees' payments of Union dues are about $255,000 per year. Based on the signed authorization for Union dues, we believe it is a violation of the Right-to-Work law. Therefore, effective after June 4, we will no longer deduct the $59.30 from your paycheck per month.
>
> The Company informed the proper Union representation on June 3, 2016 about our legal compliance regarding [the right-to-work law] implementation…

Lock's June 7 letter listed questions and answers.[15] With respect to employees' dues-checkoff forms, Lock wrote:

> Q: Do I have to sign a new authorization card? The union has not shown me anything.

[13] Lock testified generally that the automatic renewal of the contract and the Respondent's cessation of dues checkoff generated questions from employees. (Tr. 124, 127.) However, no employee testified as to asking Lock questions and no documentary evidence regarding questions being asked was entered into evidence to support Lock's testimony.

[14] Jt. Exh. 8.

[15] Jt. Exh. 9.

A: This is a personal choice that every individual has to decide on their own of whether they will continue to be a paying member of the union or not.

The remainder of the letter stated, in part:

Q: Look at the yearly total we pay the union, where is all that money going?
A: Much of the information about the distribution of union dues is publicly accessible. For example you can Google IAM and find answers to your questions directly from the source or other sources if you want to find out more.

Q: Why should I pay them anything after they screwed up the contact negotiations?
A: This is a personal choice that every individual has to decide on their own and how they will handle their money.

Q: Can I still work here if I don't join the union?
A: Yes. By state law, being a member of the union is no longer a condition of employment.

Q: What happens if we decide not to pay union dues?
A: Then you don't pay union dues.

Q: Who do we send our payment to for union dues and how much?
A: Individuals need to get payment direction and specifics from the union.

Q: Would we have to pay partial dues and a fee if I need Union representation?
A: No, not true at all.

Q: Does the Union have to represent me in a grievance if I don't pay dues?
A: Yes, this is required as part of the National Labor Relations Act.

Q: If employees drop the union, is the company going to let people go and find replacements for less money?
A: No. We have a good workforce and have every intention to keep it in place. We maintain a very competitive compensation package which allows us to retain our people and recruit the skills necessary to run our operations well. The changes made this week comply with state laws and are in no way an effort to

impact our employees financially or save money. We believe our people really do make a difference.

Lock's final letter to employees was dated June 27.[16] This letter included:

Q: Someone told me that if I don't pay union dues my name will be put on a list and posted for everyone to see. What protection will the Company provide to me for this type of harassment?

A: Posting a list to coerce people is harassment and is illegal. The Company does not tolerate illegal conduct. Every employee has a right to make their own decision about whether to pay Union dues. That decision is deeply personal and private. It is illegal for either the Company or the Union to do anything that would be considered a threat to provoke or encourage an individual's decision on union dues.

Q: I was told if I don't pay dues, co-workers who do pay dues will no longer assist or help me with my work or provide me with training. Is that true?

A: No, people are expected to work together and help each other. A job requirement in every job description is to help and assist other employees in conducting their jobs. A refusal or a concerted effort to avoid helping other employees because of an individual's personal decision on paying dues will be handled according to our discipline language.

Q: Other people had told me that I should pay union dues myself with a direct deduction from my checking account. Should I do that?

A: Whether to pay union dues, and whether to give the union access to your checking account is up to each individual to decide. Such a decision is voluntary and it is your choice. The Company has been as clear as possible with the Union that we acknowledge that we have a legal obligation to collect Union dues from employees as soon as the union presents signed dues checkoff authorization forms that comply with the state law requirement that such decisions are voluntary. The Company intends to honor and follow Article 25 of the contract. The Company does not wish to break the law by collecting dues under the current authorization forms that have were signed (sic) by employees prior to June 5, 2016 when they were told that such a payment was a condition of employment. The Company will not break the law.

[16] Jt. Exh. 14.

> Q: Do I have to pay union dues and sign a new authorization form to check-off dues to work at Metalcraft?
> A: No. The Law in Wisconsin changed and after June 4, 2016, the mandatory payment of union dues is illegal and you cannot be forced to pay union dues.
>
> - The Union wants you to pay $59.30 per month. You do not have to pay union dues to work at Metalcraft; that's $711.60 per year or .34 cents for each hour you work.
> - The decision is yours and it's purely voluntary!
> - You do not have to sign a new authorization card; it is your decision and it is purely voluntary.
> - By the IAM giving you a new authorization form, the union now recognizes that the old forms were signed when dues were required and mandatory. That's changed!
>
> Q: Can I be forced, pressured or coerced into signing an authorization form or paying union dues?
> A: No. That is illegal! If this happens, appropriate action will be taken to protect employee rights.

At the end of each of these letters, Lock invited employees to ask him or their supervisors any questions they had. Lock stated in two of the letters that the Respondent would do everything possible to get employees the "most direct and correct answer quickly."

E. The Union's Grievance Over the Respondent's Cessation of Dues Checkoff

On June 10, the Union filed a grievance to contest the Respondent's dues-checkoff cessation.[17] In the grievance, the Union only alleged a violation of article 25.3 of the contract dealing with dues checkoff. The parties held a meeting on June 16, but were unable to resolve the grievance. Lock then sent the Union a written denial of the grievance dated June 24.[18] In that letter, Lock stated for the first time that the Respondent would resume dues checkoff, if and when the Union provided new authorization forms compliant with Wisconsin law. He also stated:

> To be clear, we are not contending that Section 25.3 is unlawful. Among other legal objections to your grievance, the authorizations that you are using to accomplish the check off provision in Section 25.3 are unlawful. By seeking to use and continue those unlawful authorizations you are attempting to force us to engage in an unlawful act.
>
> We take the position that your authorizations are unlawful because on page two [the "Notice"] it provides in part "Employees working under collective-bargaining agreements containing union security

[17] Jt. Exh. 10.
[18] Jt. Exh. 12.

> clauses are required, as a condition of employment, to pay amounts equal to the Union's monthly dues…" [Emphasis added in the original.]
>
> Prior to June 5th the language of your authorization form was permissible. After that date, however, the renewal of the CBA mandated that Wis. Stats. § 111.04 (3)(a)(3) became applicable. Section 25.3 requires an "authorization (conforming to applicable law)." After June 5, 2016 your authorization no longer conforms to Wisconsin I.aw.

Parr responded via letter dated June 27 and denied that the Union's existing authorizations were unlawful.[19] The Union also requested, and the Respondent ultimately provided, all of the existing authorizations the company had on file. At a subsequent meeting on August 1, the Union asked the Respondent to reinstitute dues checkoff based on the existing authorization forms. The Respondent rejected this request in writing dated August 4.[20] In late August, the parties agreed to hold the grievance in abeyance pending the outcome of this case.

F. The Respondent's Resumption of Dues Checkoff in October 2016

On October 3, the Union acceded to the Respondent's demand and provided more than 300 new "Membership Application and/or Check-Off Authorization" forms signed by employees.[21] Parr did this because he wanted to show the Respondent that an overwhelming majority of bargaining unit employees still wanted the Union there. Parr likewise wanted to restart the Union's revenue stream, which was needed to fund its representational activities.[22] For forms that were signed and dated on June 5 or later and had the boxed checked next to "Check-Off Authorization," the Respondent resumed making dues deductions and remitting payment to the Union that month.[23] The language on the first page of the new form was identical to the old form. However, the new form does not appear to contain the "Notice" from the prior form.[24] As a result of the resumption of dues checkoff in October, the period during which the Respondent did not deduct and remit dues to the Union included the months of June, July, August, and September 2016.[25]

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[19] Jt. Exh. 13. As noted above, June 27 also was the date that Lock sent his third letter to employees. In that letter, Lock claimed the Union had provided new authorization forms to employees, because the Union recognized the old forms were invalid.

[20] Jt. Exh. 16.

[21] Jt. Exhs. 17 and 18; R. Exh. 16.

[22] I found Parr credible when testifying concerning the reasons why the Union ultimately decided to submit the new checkoff authorization forms, despite believing that the prior forms remained valid. (Tr. 63, 65–66, 90–93.) His testimony was consistent on both direct and cross examination. That the Union would need 4 months to obtain employees' signatures on new forms in a unit of over 300 employees is understandable. That same time period renders it logical that the Union was beginning to feel the strain of the lack of dues payments.

[23] Jt. Exh. 19.

[24] Compare Jt. Exh. 3 with Jt. Exh. 18.

[25] Jt. Exh. 4.

ANALYSIS

I. WAS THE RESPONDENT'S CESSATION OF DUES CHECKOFF A UNILATERAL CHANGE IN WORKING CONDITIONS THAT VIOLATED SECTION 8(A)(5)?

The General Counsel's complaint alleges that the Respondent's cessation of dues checkoff since June 4 constitutes an unlawful unilateral change and a failure and refusal to bargain collectively and in good faith with the Union. (Complaint Pars. 6(a) through 6(d), 8.)

A. The Respondent Made a Unilateral Change to Working Conditions When It Ceased Dues Checkoff in June 2016.

The law is well settled that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment, without providing their bargaining representative with prior notice and a meaningful opportunity to bargain over the changes. *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 2 (2015), citing to *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Dues checkoff likewise long has been considered a matter related to working conditions within the meaning of Section 8(a)(5) and 8(d) of the Act, and thus a mandatory subject of bargaining. Ibid.; see also *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), enfd. 564 F.3d 1330 (D.C. Cir 2009); *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962).

No dispute exists that the Respondent ceased checking off dues for employees in June and did not resume it until October. The Company did so despite the parties' contract, including article 25.3 requiring checkoff, automatically renewing for 1 year on June 5. When an employer ceases to deduct and remit dues in derogation of an existing contract, it has unilaterally changed the terms and conditions of employment of its employees and violates Section 8(a)(5) of the Act. *Shen-Mar Food Products, Inc.*, 221 NLRB 1329 (1976), enfd. as modified, 557 F.2d 396 (4th Cir. 1977).

Before ceasing dues deduction, the Respondent did not provide the Union with adequate notice of its intended change to permit meaningful bargaining to occur. The date the Respondent provided actual notice of its planned change was June 3. On that date, Lock stated, for the first time, his view that article 25 in its entirety, as well as the Union's membership application and dues-checkoff authorization form, were unlawful under the right-to-work law. He also advised the Union for the first time that the Respondent would not enforce either article 25 or the authorization form after June 4. Lock even confirmed that the Respondent provided notice to the Union on June 3, by stating such in his June 6 letter announcing the change to employees.

The Respondent argues that it provided notice of the change to the Union on April 12, when Lock wrote to Grapentine that the contract would renew after June 4 and that the renewal put the Wisconsin right-to-work law into effect. I find no merit to this contention. In its communications to the Union from April 12 to May 4, the Respondent generally stated its view that, upon contract renewal, the Wisconsin right-to-work law would apply to and impact the parties' collective-bargaining agreement by rendering "several provisions" unlawful. But the only specific provision that Lock ever identified was the union security clause. Similarly, the Union's communications in that time period only mentioned the Respondent's desire to negotiate

over union security. At no time prior to June 3 did the Respondent even mention dues checkoff, let alone indicate it planned on ceasing checkoff upon renewal of the parties' contract. Thus, the Respondent's statements were not sufficiently specific to advise the Union that the Company would stop checking off dues. See, e.g., *Coastal Cargo Co.*, 353 NLRB 819, 821 (2009), reaffd. 355 NLRB 704 (2010) (letter from employer to union stating "it may be necessary to pay in excess of the wage rate" due to labor shortage did not put union on notice of subsequently implemented wage increase); *Pan American Grain Co., Inc.*, 343 NLRB 318 (2004), enfd. in relevant part 432 F.3d 69 (1st Cir. 2005) (general statement by employer that it anticipated layoffs in the future not adequate notice for a specific layoff later implemented); *Oklahoma Fixture Co.*, 314 NLRB 958, 960–961 (1994) ("inchoate and imprecise" announcement of future plans does not constitute adequate notice and trigger a union's obligation to request bargaining).

This sequence of events establishes that the Union had no meaningful opportunity to bargain over the change before it was made. To satisfy its bargaining obligation, an employer "must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments and proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). Here, the Respondent provided notice of the dues-checkoff cessation to the Union 2 days prior to the contract renewal. It stated therein that "neither [article 25 nor the authorization form] *will* be enforced." Then, 1 day after renewal, the Company informed its employees that it "*will* no longer deduct" dues payments from their paychecks, effective June 4. In its June 7 letter to employees, the Respondent stated repeatedly that it made this change in order to comply with State law and avoid criminal prosecution. These communications cast the Respondent's decision as final and already implemented. Lock gave no indication therein that the decision was subject to bargaining with the Union. Under these circumstances, the Respondent's June 3 notice to the Union of the change was a fait accompli. See, e.g., *American Medical Response of Connecticut, Inc.*, 359 NLRB 1301, 1302–1303 (2013), reaffd. 361 NLRB No. 53 (2014) (communication to union on same day change to procedures was implemented was a fait accompli); *Burrows Paper Corp.*, 332 NLRB 82, 83 (2000) (notice of wage increase to union 1 day before increase was announced to employees did not afford union the opportunity to bargain). Cf. *Sutter Tracy Community Hospital*, 362 NLRB No. 199, slip op. at 3 (2015) (no fait accompli when employer notified union of proposed changes to health benefits, told the union it would delay notification to employees to allow time for bargaining, and advised employees that benefits would be finalized only after the union had a full opportunity to bargain over proposals.)[26]

Accordingly, the Respondent's unilateral cessation of dues checkoff in June 2016, without providing the Union notice and an opportunity to bargain, violates Section 8(a)(5), absent a valid affirmative defense.

[26] Article 25.4 of the parties' contract required the Respondent to remit the dues deductions to the Union no later than the 15th of the month. (Jt. Exh. 2.) As a result, the Respondent's dues payment to the Union technically would not have been past due until June 16. In theory, then, the parties could have negotiated over the dues-checkoff cessation from June 5 to 15, before the Respondent's lack of payment would have been in dereliction of its contractual obligation. However, because the Company's communications rendered its decision a fait accompli, this theoretical opportunity does not constitute a meaningful opportunity to bargain. *Dixie Electric Membership Corp.*, 358 NLRB 1089, 1092 (2012), reaffd. 361 NLRB No. 107 (2014).

B. The Wisconsin Right-to-Work Law's Provisions on Dues Checkoff Are Preempted by the National Labor Relations Act and Do Not Provide a Basis for the Respondent's Cessation of Dues Checkoff.

The Respondent asserts two affirmative defenses in its answer, both of which argue the Wisconsin right-to-work law rendered illegal all dues-checkoff authorization forms signed prior to June 5. The Respondent contends that Section 14(b) of the Act authorized the State law. In turn, the State law made it illegal to require union membership, dues payments, and dues checkoff as conditions of employment. These contentions raise the question of whether the Act preempts the Wisconsin right-to-work law's provisions on dues checkoff.

Addressing this question begins with an assessment of the relevant statutory language at the Federal and State levels. At the Federal level, Section 8(a)(3) of the Act addresses union security. That section renders lawful an agreement between an employer and union that requires employee membership in a union, or the payment of an agency fee for the cost of representation, as a condition of employment. However, Section 14(b) of the statute permits states to opt out and pass a law prohibiting such union-security agreements. Section 14(b) makes no mention of dues checkoff.

Instead, dues checkoff is addressed in the Act solely in Section 302. That provision generally makes it unlawful for an employer to pay any money to a labor organization which represents its employees. One of the exceptions to this ban is payments from an employer to a labor organization "with respect to money deducted from the wages of employees in payment of membership dues in a labor organization." Dues payments only can be made when:

> the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

As discussed above, the Wisconsin right-to-work law requires dues authorization forms to be terminable by an employee upon 30 days' notice. Thus, the State law is contrary to Federal law in this regard.

Some 40 years ago, the Board squarely addressed the impact that state right-to-work laws have on dues checkoff. In *Shen-Mar Food Products,* 221 NLRB at 1329–1330, an employer ceased deducting and remitting the union dues of 9 employees, after they resigned from the union and submitted letters to the employer requesting the cancellation of their voluntary checkoff authorizations. The requests were untimely under terms of those authorizations, which followed Federal law. The Board concluded that the employer's action in those circumstances was an unlawful Section 8(a)(5) unilateral change. In so holding, the Board rejected the employer's argument that the State of Virginia's right-to-work law permitted it to cease dues checkoff. That state law prohibited employers from deducting dues after an employee terminated membership in the union by resignation. In that regard, the Board stated:

> …[W]e agree with the Administrative Law Judge that the dues checkoff herein does not, in and of itself, impose union membership or support as a condition required for continued employment, and that matters concerning dues-checkoff authorization and labor agreements implementing such authorizations are exclusively within the domain of Federal law, having been preempted by the National Labor Relations Act and removed from the provisions of Section 14(b) by the operation of Section 302.

Id. at 1330. In enforcing the Board's order, the Fourth Circuit Court of Appeals found "well supported" the Board's holding that a contractual dues-checkoff provision is not a union-security device subject to State law under Section 14(b). *NLRB v. Shen-Mar Food Products, Inc.*, 557 F.2d at 399.

Six years prior to *Shen-Mar*, the U.S. Supreme Court summarily affirmed a district court decision with the same holding. In *SeaPak v. Indus., Tech. & Prof'l Emp., Div. of Nat'l Mar. Union, AFL-CIO*, 300 F. Supp. 1197, 1200 (S.D. Ga. 1969), affd. sub nom. 423 F.2d 1229 (5th Cir. 1970), affd. sub nom. 400 U.S. 985 (1971), the State of Georgia enacted a right-to-work law, which gave employees the ability to revoke their dues-checkoff authorizations at will. The district court found this provision was preempted by the Act. The court held that the area of dues checkoff was federally occupied to such an extent that no room remained for state regulation. The district court also rejected the state's argument that Section 14(b) of the Act permitted it to regulate dues checkoff.

Since then, numerous Federal courts have relied upon *SeaPak* to reach the same conclusion that State laws on dues checkoff are preempted by the Act. In particular, after the close of the hearing in this case, a Federal district court in the Western District of Wisconsin held that the portion of Wisconsin's right-to-work law addressing checkoff was preempted and therefore unconstitutional. *International Association of Machinists District 10 v. Allen*, No. 16-cv-77-wmc (W.D. Wis., Dec. 28, 2016). See also *UAW Local 3047 v. Hardin County, Kentucky*, 842 F.3d 407, 420–422 (6th Cir. 2016) (county dues-checkoff ordinance preempted); *Georgia State AFL–CIO v. Olens*, 194 F. Supp. 3d 1322, 1329–1331 (N.D. Ga. 2016) (Georgia right-to-work law provision on dues checkoff preempted); *General Cable Industries v. Teamsters Local 135*, No. 15-cv-81 (N.D. Ind., June 17, 2016) (same as to Indiana right-to-work law); *UFCW Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1180–1182 (D. Az. 2013) (same as to Arizona right-to-work law); *Local 514, TWA v. Keating*, 212 F. Supp. 2d 1319, 1326–1328 (E.D. Ok. 2002) (same as to Oklahoma right-to-work law).

The *SeaPak* and *Shen-Mar* decisions control the outcome in this case on the question of federal preemption of dues checkoff. Pursuant to Section 14(b) of the Act, the State of Wisconsin was free to enact a law prohibiting union-security agreements. However, that section does not permit the state to regulate dues checkoff. While Wisconsin law allows revocation of a dues-checkoff authorization upon 30-days' notice, Federal law permits dues-checkoff agreements that are irrevocable for 1 year. The two provisions are directly at odds with one another. I conclude that the provisions of Wisconsin's law addressing that topic are preempted.

The Respondent attempts to avoid this outcome by arguing that union security and dues checkoff are "inseparably linked" to such an extent that states also are permitted to regulate dues checkoff under Section 14(b), just as they are permitted to regulate union security. However, in *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 6–7, the Board specifically rejected the notion that union-security and dues-checkoff arrangements are so similar or interdependent that they must be treated alike. Although *Lincoln Lutheran* addressed the question of whether an employer's obligation to check off union dues terminated upon the expiration of a collective-bargaining agreement, the Board's finding that the two concepts are not intertwined is equally applicable here.

The Respondent also relies heavily upon the Board's decision in *Penn Cork & Closures, Inc.*, 156 NLRB 411 (1965), enfd. 376 F.2d 52 (2d Cir. 1967), cert. denied 389 U.S. 843 (1967). In that case, employees voted in a deauthorization election to withdraw the authority of the employer and union to agree to require union membership as a condition of employment. Thereafter, a number of employees submitted their resignations from union membership, as well as a request to cease dues checkoff. The employer accepted the membership resignations, but continued checking off dues. The company did so, because the signed authorization forms did not permit revocation at the time the employees submitted the requests. Under the specific factual circumstances of that case, the Board found the employer's refusal to cease dues checkoff violated the Act. The Board rejected the union's argument that the right to discontinue union membership did not extend to dues checkoff, because the two concepts were distinct. The Board concluded "on the facts before us we cannot agree that the exercise of [dues checkoff] is in all circumstances independent of the impact of union security." Id at 414.

To the extent that *Penn Cork* suggests that, in some cases, union security and dues checkoff are linked, it supports the Respondent's argument. Nonetheless, I do not find the decision controlling here. The *Penn Cork* Board was careful to make clear it was deciding the issue based upon the specific facts presented in that case. In this case, the Wisconsin right-to-work law, not a deauthorization election, caused the elimination of the union-security agreement in the parties' contract. Moreover, none of the Respondent's employees sought to revoke their checkoff authorizations after that elimination occurred. These distinguishing facts take this case outside the realm of *Penn Cork*. In addition, the Board decided *Shen-Mar*, a case directly on point, some 12 years after *Penn Cork* and presumably was aware of its prior *Penn Cork* holding when doing so. In any event, the viability of the *Penn Cork* decision has been called into question by the Board's decision in *Lincoln Lutheran*, as noted by the dissent in that case.

The remaining question here is whether the dues-checkoff authorization forms executed by employees prior to June 4 imposed dues checkoff as a condition of employment. As previously noted, I have rejected the Respondent's contention that it forced employees to agree to dues checkoff after they were hired. That leaves the language contained in the authorization form itself. On the one hand, the form contains both union-security and dues-checkoff provisions. On the other, the checkoff language specifically states that employees were agreeing that "this authorization is independent of, and not a quid pro quo, for union membership." The language further noted that dues checkoff "shall continue in full force and effect even if I resign my Union membership, except if properly revoked" in the manner prescribed therein. Even the title of the form and its use of "and/or" between union membership and dues checkoff signals that the two provisions are independent of one another. No basis exists for a finding that dues

checkoff was a condition of employment. The credited testimony and the form language establish that dues checkoff was voluntary.[27]

Because union security and dues checkoff are distinct concepts, the Respondent's reliance on the union-security language in the notice attached to the pre-June 5 authorization forms likewise is misplaced. That notice is the one required by the U.S. Supreme Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), and the Board's subsequent decision in *California Saw and Knife Works*, 320 NLRB 224 (1995). It does not address dues checkoff in any fashion, let alone require it as a condition of employment. To the extent the Respondent may be contending that the entire form was rendered illegal when union security became illegal, the state law and the party's contract contradict that argument. Both provide for the separability of provisions that remain lawful. That means the union-security provisions in the parties' contract and in the authorization form are void, but not the entire agreement or form.

For all these reasons, I conclude that the Wisconsin right-to-work law eliminated the union-security requirement in the parties' collective-bargaining agreement in article 25.1 and 25.2, but had no impact on the dues-checkoff agreement in article 25.3. I also find that the authorization forms signed by employees prior to June 5 remained valid, because the "applicable law" to which they had to conform was federal, not state, law. I reject the Respondent's claim that the state law rendered employees' dues-checkoff authorizations illegal and permitted the Company to unilaterally cease dues checkoff.

C. The Union Did Not Waive Its Right to Bargain Over Dues Checkoff.

The Respondent's last affirmative defense as to the Section 8(a)(5) unilateral change allegation is that the Union clearly and unmistakably waived its right to bargain over or bring an unfair labor practice claim involving the dues-checkoff cessation.[28]

Waiver of a statutory right must be clear and unmistakable. *Amoco Chemical Co*., 328 NLRB 1220, 1221–1222 (1999); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708–710 (1983). Establishing waiver is a heavy burden, not to be lightly inferred. *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999). A union's waiver of the right to negotiate over dues checkoff will not be inferred "in the absence of unambiguous contract language to that effect or a history of negotiations demonstrating that fact." *Shen-Mar*, 221 NLRB at 1330. In interpreting contractual language, the Board looks to the plain meaning of the language itself and to any relevant extrinsic evidence. *Mining Specialist, Inc.*, 314 NLRB 268, 268–269 (1994).

[27] In any event, the Respondent did not cease dues checkoff only for those employees who signed authorizations containing union-security language. The Company stopped all deductions, including for employees who had signed forms after 2001 which contained only dues-checkoff language.

[28] The Respondent's clear and unmistakable waiver defense applies only to the General Counsel's allegation of a unilateral change in working conditions. See *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005). Although the General Counsel also alleged an 8(d) contract modification, the Respondent did not assert in an affirmative defense or in its brief that the Union consented to a change in the contractual dues-checkoff provision.

The Respondent argues that the Union waived its right to challenge the dues-checkoff cessation by agreeing to the indemnification language contained in article 25.2 of the parties' collective-bargaining agreement. To reiterate, that section addressed union security and stated:

> The Company, within three (3) days after receipt of written notice from the Union, will discharge any employee subject hereto who is not in good standing in the Union as required by the preceding paragraph. *The Union shall indemnify and save the Company harmless against all forms of liability that shall arise out of or by reason of the application of this Article.* [Emphasis added.]

The Respondent presented no extrinsic evidence concerning the parties' negotiations or discussions over this provision, leaving only the language itself.

The question presented here is whether the indemnification language, specifically the reference to "this Article," applies only to article 25.2 or to the entirety of article 25.[29] If it applies only to article 25.2, then the Union agreed to indemnify the Respondent against any liability arising from it discharging employees for not being in good standing with the Union. If it applies to the entire article, then the Union also indemnified the Respondent against any liability arising out of article 25.3 requiring it to check off dues. By its placement in this specific provision, I conclude that it only applies to article 25.2. An indemnification clause intended to apply to all of article 25 logically would have been placed in a separate, stand-alone provision at the end of that article. In any event, to the extent the placement of "this Article" results in ambiguity over the portion of article 25 to which it applies, that ambiguity prevents a finding of clear and unmistakable waiver by the Union. Therefore, I reject the Respondent's reliance on the indemnification language to support its waiver argument.

The Respondent next argues that the Union waived its right to negotiate by failing to request bargaining after receiving notice of the Company's intent to cease dues checkoff. As noted above, I have concluded that the Respondent did not provide actual notice until June 3 and that the change was presented as a fait accompli. In those circumstances, the lack of a request to bargain does not constitute a waiver. *Tri-Tech Services*, 340 NLRB 894, 903 (2003) (if a union is presented with a fait accompli, it need not engage in a meaningless effort to turn back the clock and rescind the change). Moreover, the Union's submission of new authorization forms in October likewise does not support the Respondent's waiver argument. The Union's motivation for doing so at that point principally was to resume receiving needed compensation for its representational duties related to the bargaining unit. The Union was forced into the position of complying with the Respondent's demand, only because the Company had unlawfully ceased dues checkoff.

[29] In both its answer and brief, the Respondent states that the indemnification provision is contained in art. 25.3 addressing dues checkoff, which simply is incorrect.

As the Respondent has not established any valid affirmative defense, its cessation of dues checkoff on June 5 violated Section 8(a)(5).[30]

II. DID THE RESPONDENT UNDERMINE THE UNION AND ENGAGE IN DIRECT DEALING THROUGH ITS WRITTEN COMMUNICATIONS WITH EMPLOYEES?

The General Counsel alleges that the Respondent undermined the Union by communicating with employees regarding the appropriateness of their current authorization forms, in violation of Section 8(a)(1).[31] The complaint also claims that the Respondent bypassed the Union and dealt directly with employees by soliciting revised authorization forms in violation of Section 8(a)(5). These allegations are premised on Lock's June 6, 7, and 27 letters to employees. (Complaint Pars. 7 and 8.)

A. The Respondent Undermined the Union in its June 2016 Letters to Employees, Thereby Violating Section 8(a)(1).

Employer communications that reasonably tend to undermine employees' confidence in and support for their union are coercive and violate Section 8(a)(1). See, e.g., *RTP Co.*, 334 NLRB 466, 479 (2001), enfd. 315 F.3d 951 (8th Cir. 2003); *Facet Enterprises, Inc.*, 290 NLRB 152, 153 (1988), enfd. in relevant part 907 F.2d 963 (10th Cir. 1990). However, Section 8(c) of the Act permits an employer to lawfully express views, argument, or opinion, including by written dissemination, to employees, if the communication does not express any threat of reprisal or force or promise of benefit.

No question exists that the Respondent, in its letters to employees, repeatedly asserted its position that the Wisconsin right-to-work law prohibited it from continuing to check off union dues. That assertion was a misstatement of the law under *SeaPak* and *Shen-Mar*. Such misstatements have been found to violate Section 8(a)(1), albeit in different factual circumstances. *Eagle Comtronics, Inc.*, 263 NLRB 515, 515 (1982) (employer statements to employees on their job status following a strike violate the Act, where they are inconsistent with the law); *The May Department Stores Co.*, 191 NLRB 928, 937–938 (1971) (employer violated Section 8(a)(1) by circulating memorandum to employees announcing it would refuse to bargain with union in order to test the Board's certification); see also *RTP Co.*, 334 NLRB at 467, 479

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[30] In its answer to the complaint, the Respondent also asserted that this case should be deferred to the parties' grievance and arbitration procedure in the collective-bargaining agreement, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). However, in its brief, the Respondent stated it was no longer willing to arbitrate the pending grievance and otherwise did not address the issue. (R. Br. p. 3.) As a result, I find it has waived this defense. *SBC Midwest*, 346 NLRB 62, 64 fn. 8 (2005).

[31] The General Counsel's complaint alleged that the Respondent's communications to employees violated Sec. 8(a)(5) and (1) by undermining the Union. The complaint did not allege this as an independent 8(a)(1) violation, but counsel for the General Counsel argues for such a finding in her brief. Irrespective of the statute provision relied upon, the complaint did challenge the legality of the Respondent's communications. In addition, the Respondent had the opportunity at the hearing to fully litigate the nature and extent of its communications to employees. I conclude that the independent 8(a)(1) violation is related to the allegations in the complaint; the matter was fully and fairly litigated; and the Respondent has not been prejudiced. Accordingly, I find it proper for me to consider this allegation. *Facet Enterprises*, 290 NLRB at 153.

(misstatement of fact in employer's letter to employees, which would reasonably tend to undermine employees' confidence and support for their union, violated Section 8(a)(1)). The Respondent asserts it was making a prediction to employees about the impact of the right-to-work law and is allowed to express its viewpoint under Section 8(c), even if it ultimately ended up being wrong. But the Respondent cites to no case law supporting that position. In any event, the Respondent's statements to employees concerning that impact were framed as a certainty, not a prediction. The Respondent also made no mention to employees of the Union disagreeing with the Company's position.

The Respondent also disparaged the Union in multiple statements that went beyond merely expressing its position as to the impact of the Wisconsin right-to-work law. Lock included extraneous information, such as the total yearly dues payment for each employee and for all employees in sum. He also listed purported questions in the communications that raised doubt as to the competency of the Union's representation. These included, "[l]ook at the yearly total we pay the union, where is all that money going?" and "[w]hy should I pay them anything after they screwed up the contract negotiations."[32]

In contrast to this dim view of the Union, the Respondent repeatedly reassured employees that they would suffer no harm if they ceased paying union dues and portrayed itself as their guardian. Lock said the Respondent would protect employees who chose not to pay union dues from any repercussions from the Union or coworkers. He noted the Union would continue to have to represent them, even if they did not pay dues. He even offered that employees would be fine if they dropped the Union entirely. What is notably missing from all these communications is any reassurance to employees who wished to continue paying dues through payroll deductions.

Finally, the Respondent sent these letters to employees after unlawfully ceasing dues deductions in June 2016. That the communications resulted from the Respondent's unfair labor practice lends further credence to the finding that they are unlawful.

Accordingly, I conclude Lock's June 2016 letters to employees violate Section 8(a)(1) by undermining employee confidence in and support of their Union.

B. The Respondent Dealt Directly with Employees by Soliciting New Authorization Forms in Violation of Section 8(a)(5).

Direct dealing in violation of Section 8(a)(5) and (1) is shown where an employer communicates with represented employees to the exclusion of their union for the purpose of establishing working conditions or making changes regarding a mandatory subject of bargaining. *Permanente Medical Group*, 332 NLRB 1143, 1144–1145 (2000); *Southern California Gas Co.,* 316 NLRB 979, 982 (1995). The established criteria for finding that an employer has engaged in unlawful direct dealing are (1) that the [employer] was communicating directly with union-

[32] The Respondent suggests that a violation cannot be premised upon its recitation of questions that employees asked after the Company announced it was ceasing dues deductions. I disagree. The Respondent did not present any employee testimony at the hearing to corroborate that they asked any of the questions contained in the three letters. Even if they were asked, the Respondent chose on its own to list questions that contained disparaging statements about the Union, rather than revising the wording to make it noncoercive.

represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010) (citations omitted).

The General Counsel's direct dealing allegation is premised on the following language in Lock's June 7 letter, restated here in full:

> Q: Do I have to sign a new authorization card? The Union has not shown me anything.
> A: This is a personal choice that every individual has to decide on their own of whether they will continue to be a paying member of the union or not.

Taken in context, I find the language sufficient to demonstrate unlawful direct dealing in violation of Section 8(a)(5). No dispute exists that the Respondent submitted the June 7 letter directly to employees and did not provide it to the Union. The issue here, then, is whether the cited language is sufficient to demonstrate that the Respondent was seeking to change working conditions or to undercut the Union. To be sure, this question and answer does not contain any direct instruction to employees to submit new authorization forms. Nonetheless, the Respondent certainly suggested that employees had to do so, if they wished to continue being dues-paying members of the Union. That suggestion was inaccurate, since the existing authorization forms remained valid and, in any event, employees could remain members and pay dues without using checkoff. It is another instance of the Respondent incorrectly intertwining the concepts of union security and dues checkoff. By suggesting new forms were needed, the Respondent was seeking to alter the requirements of dues checkoff, a mandatory subject of bargaining. Finally, the unnecessary inclusion of "[t]he Union has not shown me anything" is further evidence of the Company attempting to undercut the Union. For all these reasons, I find merit to the General Counsel's complaint allegation.

III. DID THE RESPONDENT MODIFY THE PARTIES' COLLECTIVE BARGAINING AGREEMENT WITHOUT THE CONSENT OF THE UNION?

Finally, the General Counsel's complaint alleges that, by ceasing dues checkoff since June 4, the Respondent unlawfully modified articles 25.3 and 25.4 of the parties' contract, within the meaning of Section 8(d) and in violation of Section 8(a)(5) of the Act. (Complaint Pars. 6(e) and 9.)

Section 8(d) provides that "where there is in effect a collective-bargaining contract…no party to such contract shall terminate or modify such contract." Where the General Counsel alleges an unlawful contract modification, the determination to be made is whether the employer altered the terms of a contract without the consent of the union. *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), affd. sub nom. *Bath Marine Draftsmen Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). Where an employer has a "sound arguable basis" for its interpretation of a contract and is not motivated by union animus, was not acting in bad faith, or did not in any way seek to undermine the union's status as collective-bargaining representative, the Board ordinarily will not find a violation. Id. at 502 (citations omitted). The issue here is the Respondent's

interpretation of a law, as opposed to a contract provision. Nonetheless, the Board has applied the contract modification standard in similar circumstances. See *San Juan Bautista Medical Ctr.*, 356 NLRB 736, 738 (2011) (employer defending denial of contractually-required bonus, on the basis of an exemption it received from the government of Puerto Rico allegedly permitting nonpayment).

Applying this standard to the facts here, I conclude that the Respondent had a sound arguable basis for contending that the Wisconsin right-to-work law prohibited continued dues checkoff. The Respondent's interpretation was based, at least in part, on the Board's decision in *Penn Cork*. That decision can be reasonably interpreted as linking union security and dues checkoff in certain circumstances, and thereby requiring the cessation of dues checkoff when a contractual union-security provision is invalidated. Moreover, and as noted above, the question of the impact of state right-to-work laws on dues-checkoff provisions has spawned countless lawsuits over the years. The decisions in those cases do not suggest that the parties contesting federal preemption of states' attempts to regulate dues checkoff were being unreasonable.

However, and as described above, the record evidence demonstrates that the Respondent, in arriving at and implementing its decision, was seeking to undermine the Union's status as collective-bargaining representative. The Company ceased checking off dues without notifying or bargaining with the Union. It almost immediately thereafter communicated directly with employees, in a manner which sought to weaken their support for the Union. Therefore, the Respondent cannot be said to have acted in good faith.

As a result, I find that the Respondent also unlawfully modified the parties' contract without the Union's consent, in violation of Section 8(a)(5).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 10 and Rock River Lodge No. 2053, International Association of Machinists and Aerospace Workers of America, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by ceasing dues checkoff for bargaining unit employees and ceasing monthly remittance of dues to the Union after June 4, 2016, without prior notice to the Union and without affording the Union the opportunity to bargain with respect to the conduct and/or effects of the conduct.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by modifying articles 25.3 and 25.4 of its collective-bargaining agreement with the Union, when it ceased checking off and remitting dues to the Union after June 4, 2016, without the Union's consent.

5. The Respondent violated Section 8(a)(1) of the Act by undermining the Union through its communications to employees on June 6, 7, and 27, 2016.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with employees to obtain new dues-checkoff authorization forms on June 7, 2016.

7. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In particular, I shall order the Respondent to rescind its unilateral cessation of dues checkoff, upon the request of the Union, and return to the status quo ante. I also shall order the Respondent to continue in effect all the terms and conditions contained in the collective-bargaining agreement between it and the Union, including articles 25.3 and 25.4 addressing dues checkoff. The Respondent must make the Union whole by reimbursing any dues the Union would have received, but for the Respondent's unlawful unilateral cessation of dues checkoff, with interest. *Hacienda Resort Hotel & Casino*, 363 NLRB No. 7, slip op. at 3 (2015); *Creutz Plating Corp.*, 172 NLRB 1 (1968). I reject the Respondent's contention, unsupported in Board law, that a proper remedy would allow it to deduct from employee paychecks the necessary dues to reimburse the Union. Rather, in conformance with the above-cited cases spanning nearly 50 years, the Respondent must directly reimburse the Union for its losses as part of the make-whole remedy. Interest is to be paid at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondent, Metalcraft of Mayville, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All full-time and regular part-time maintenance and production employees; excluding engineering department employees, supervisory employees, watchmen, quality control employees, and clerical workers.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain, including by unilaterally ceasing to check off union dues pursuant to valid checkoff authorization forms and to remit the same to the Union.

(c) Failing to continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering its employees in the unit described above, including checking off union dues and remitting the same to the Union pursuant to articles 25.3 and 25.4 of the agreement.

(d) Undermining the Union in communications with bargaining unit employees.

(e) Bypassing the Union and dealing directly with bargaining unit employees concerning their terms and conditions of employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the unit described above.

(b) Upon request of the Union, rescind the unilateral cessation of dues checkoff and resume checking off and remitting dues to the Union pursuant to the valid dues-checkoff authorizations filed with the Respondent prior to June 5, 2016, using the procedure set forth in the parties' collective-bargaining agreement.

(c) Continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering employees in the unit described above, including articles 25.3 and 25.4.

(d) Make the Union whole for any dues the Respondent should have checked off and remitted to the Union following its unlawful, unilateral cessation of dues checkoff, in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records,

timecards, personnel records and reports, and all other records necessary to analyze the amount due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Mayville, Wisconsin, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places were notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 5, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., March 10, 2017.

Charles J. Muhl
Administrative Law Judge

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the International Association of Machinists, Local Lodge No. 2053 (the Union) as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time and regular part-time maintenance and production employees; excluding engineering department employees, supervisory employees, watchmen, quality control employees, and clerical workers.

WE WILL NOT change your wages, hours, or other working conditions without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT unilaterally cease to check off and remit dues to the Union pursuant to the dues-checkoff arrangement in the parties' collective-bargaining agreement, for those employees who have executed and have in effect a valid dues-checkoff authorization form.

WE WILL NOT change the terms of our collective-bargaining agreement with the Union without the Union's consent.

WE WILL NOT undermine the Union in our communications to you, including by communicating misstatements of the law to you regarding dues checkoff or denigrating the Union's representation of you.

WE WILL NOT bypass the Union and deal directly with you regarding your working conditions, including by suggesting you need to sign a new dues-checkoff authorization form to continue paying Union dues.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in bargaining unit described above.

WE WILL, upon request of the Union, rescind our unilateral cessation of dues checkoff and resume checking off and remitting dues to the Union, pursuant to the valid dues-checkoff authorization forms filed with us prior to June 5, 2016, using the procedure set forth in the parties' collective-bargaining agreement.

WE WILL restore and maintain all the terms and conditions of employment contained in the collective-bargaining agreement covering employees in the unit described above, including articles 25.3 and 25.4 addressing dues checkoff.

WE WILL at our expense and not that of employees, make the Union whole, with interest, for any dues it should have received since June 4, 2016, but for our unlawful, unilateral cessation of dues checkoff.

METALCRAFT OF MAYVILLE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
310 West Wisconsin Avenue, Suite 450W, Milwaukee, WI 53203-2211
(414) 297-3861, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-178322 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819.